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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VIRGINIA PRIETO KELLY,

Defendant and Appellant.

D058300

(Super. Ct. No. SCD219811)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Jr., Judge. Affirmed.

A jury convicted defendant and appellant Virginia Prieto Kelly of one count of grand theft and found true the related allegations of loss exceeding \$65,000 and \$200,000. (Pen. Code,¹ § 487, subd. (a); § 12022.6, subds. (a)(1), (a)(2); count 1.) She was sentenced to three years of formal probation, including limited electronic surveillance custody, and fined. The evidence presented at trial showed that over five or

¹ All further statutory references are to the Penal Code unless otherwise noted,

more years, Kelly, while acting as president of the Latino Foster Parent Association (the Association), received on behalf of the Association, from donor organizations, many thousands of donated toys and household items for the use and benefit of foster children and foster families. However, she failed to distribute a large portion of the donated material (about 12,000 items), instead storing them, selling or allowing others to sell them, or preferentially giving many donated items to friends, family or particular clients of the Association.

On appeal, Kelly contends that no sufficient evidence was produced to establish her guilt under any of the three theories of theft presented by the prosecution, i.e., false pretense, theft by trick, and theft by embezzlement. She contends that she and her Association legitimately received the donated property, so this prosecution unduly focused on her postacquisition conduct. In her view, her delays in distribution and some diversion of property did not amount to any wrongful taking or withholding of the donated goods, in part because the donor organizations did not communicate to her any clear guidelines about the timeliness they expected for the distributions, nor any return policies, and in any case, she consistently distributed other portions of the donations.

Kelly further argues that a unanimity instruction should have been given under these circumstances, sua sponte, because the record shows many acts were described in testimony that could have supported findings that multiple distinct acts of theft occurred, against multiple victims (the three major donor organizations, or Kelly's own Association). (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).)

We have examined the record and conclude Kelly's claims of insufficiency of the evidence have no merit, because the jury could properly return a general verdict of guilty if they found an "unlawful taking" was proven, on one or more of the theories presented, and this verdict is well supported by the evidence produced about each and every one of the three theories. (See *People v. Ashley* (1954) 42 Cal.2d 246, 258 (*Ashley*).)

Kelly's instructional error argument is likewise unsuccessful. "The unanimity instruction is not required when the acts are so closely connected in time as to form part of one transaction. [Citations.] This branch of the 'continuous conduct' exception [citation] applies if the defendant tenders the same defense or defenses to each act and if there is no reasonable basis for the jury to distinguish between them." (*People v. Crandell* (1988) 46 Cal.3d 833, 875 (*Crandell*); abrogated on a different point in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) This record supports a conclusion that when Kelly retained possession and retained title of property that had been donated to the Association, she was carrying out a single, continuing course of criminal conduct, and the instructions given were adequate. (See *Russo, supra*, 25 Cal.4th 1124, 1132.) We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

An outline of the incidents and proceedings follows, with additional details to be set forth in connection with the discussions of the appellate arguments, *post*.

A. Donations to Foster Children

In 2009, Kelly was 75 years old and lived with her 81-year-old husband, several teenage foster children, and her own adopted daughter Anastacia Kelly (Anastacia). She

also had an adult daughter Theresa and adult son Philip living in the area. She and a few other persons founded the Association in the 1980's, due to a community need of assistance for Spanish-speaking foster parents. During 2003-2009, Kelly was the president of the Association, and along with one or two other persons, she always conducted most of its work, which consisted of facilitating workshops and classes on foster care issues, and collecting donations for foster children.

Kelly was prominent in the foster care community and was known to many donor organizations for her work. Staff members from the Polinsky Children's Center (PCC), and the Child Abuse Prevention Foundation (CAPF; later known as Promises to Kids; together, "donor agencies") regularly called her and offered the Association the opportunity to pick up donations of numerous items, such as toys, blankets, school supplies, and Halloween costumes.

For a few years, off and on from 1999-2003, Carmen Soto and her baby lived with Kelly. Soto worked for her, doing housework and caring for Kelly's foster children. Beginning in the early 2000's, Kelly stored many bags of donations in two upstairs bedrooms and a bathroom, which were kept locked, and in an outside shed. Her daughter Theresa bought a house on Church Street that had a detached garage, and starting in 2006, Kelly stored other items there.

In preparation for the Christmas seasons starting around 2002, Kelly's Association received numerous donations of toys from Toys for Tots (TFT, also "donor agency"), on behalf of local foster children. PCC and CAPF donated many items year-round. Several years, including 2008, Kelly signed an agreement with TFT that did not contain any

express policy about giving back any unused donations or setting forth any time frame within which the donor agency expected distribution to be accomplished.

B. Complaints, Investigation and Charges

In the mid-2000's, Soto moved to an apartment complex. A few times, while she was still working for Kelly, she and Kelly's family members took items from Kelly's house, such as clothes, blankets, and costumes, to the swap meet and sold them, and gave the proceeds to Kelly. A year or two later, Soto posted signs at her apartment complex to publicize that she was selling toys and Halloween costumes. In 2007, Soto received \$80 from Kelly for selling \$400 of her Halloween costumes and toys at her apartment complex. In 2008, Soto paid Kelly \$200 to obtain costumes to sell, but not all were saleable.

For about five years before 2008, Laura Chavez, a neighbor of Soto's and a longtime foster parent, bought toys from Soto during the Christmas seasons, after seeing Soto's signs in the laundry room of her apartment complex. For three years, Chavez also bought Halloween costumes from Soto for about \$7-8 cash each. During the 2007 and 2008 Christmas seasons, several times, Chavez saw Kelly bringing a few "big black garbage bags" to Soto's apartment. During 2008, Chavez bought about \$50 worth of toys from Soto.

In December 2008, Chavez called San Diego County Foster Care social worker Teresa Montes, who was familiar with Kelly, to complain that Kelly was requiring payment and certain training before Chavez could receive any toys for her foster children from her. Montes knew that foster parents were not required to attend any particular

number of hours of training in order to receive toys at Christmas time. Montes passed along the complaint to a fellow official, who passed it along to foster care licensing.

Chavez and Soto were interviewed December 22, 2008, by an investigator with the District Attorney's office, Salvador Campos, and he decided to investigate Kelly's activities further. Soto explained that she had made about \$500 (later dropped to \$400) selling toys for Kelly, and was paid \$80, but she stopped selling things obtained from Kelly when Chavez and Anastacia told her they were donated goods meant for foster children.

On January 21, 2009, Campos and a fellow investigator, Scott Young, went to Kelly's home. She told them her Association received donated toys from TFT, PCC, and CAPF, although she did not keep written records. She estimated TFT gave her 1,700 toys over 2007-2008, and she gave them all out except for 600, which she distributed later on. The investigators asked if they could go upstairs to confirm all the toys were gone, but she said no because she had to go to a doctor's appointment. She told Campos and Young to go check with staff at the local Christian Life Center, which also gave her donations, and they left.

However, Young stayed in the area, and observed that over the next few hours, Kelly, her son Philip, her foster daughter Jessica E., and another young woman were using two vehicles to load and unload many large black garbage bags, taking them from her home and putting them in a storage unit nearby. Young relayed this information to Campos, and Campos talked to the storage facility manager. He learned that Kelly had rented her unit that day.

Campos and other investigators obtained search warrants and executed them on February 4, 2009, searching Kelly's home and the storage unit she rented. The storage unit was completely filled with "a mountain" of toys, black bags and boxes of toys.

When Campos and the other investigators got to Kelly's home on February 4, 2009, they told her they had a search warrant and they had found toys in her storage unit. They tape recorded their interview with her, and a transcript of it was admitted into evidence at Kelly's trial. Kelly admitted she had lied to them in January about not having any toys at the house, and said she was scared, so she hid the toys. She said she had been keeping about 25 percent of the toys for next year or later distribution. She said the organizations did not expect her to give away all the toys the same day.

Around the house, Campos could see many stuffed animals and Kelly told them they were for her own children. The investigators used a key and code to unlock and enter the upstairs bedrooms. In the first, they found quilts, blankets, and clothes that Kelly said she had bought or that were donated by the Christian Life Center, and those were not confiscated. In another bedroom, they found and seized many toys in good condition that still had tags on them, as well as numerous stuffed animals that were piled up to the ceiling. Clothes and "Eagle Creek" pouches, later identified as coming from PCC or CAPF, were also seized.

During the February 4, 2009 search, which lasted over 10 hours, the investigators also found items in the shed outside Kelly's home, such as clothing, quilts, and black bags. They talked to Kelly's daughter and foster children, asking where the items came from, and were told that PCC donated them. One foster daughter told them about another

house or garage on Church Street that was also used for Kelly's storage, so they went over there and looked in the window, seeing piles of black bags.

On March 12, 2009, Campos and other investigators executed a search warrant at the garage at the house owned by Theresa on Church Street. The garage was completely full of toys and stuffed animals. About 7,500 to 8,000 toys, shoes, backpacks, and costumes were found there, along with several garage sale signs, and they were seized. The investigators determined that the blankets and quilts Kelly had at her home came from PCC or CAPF donations, and confiscated them.

Kelly was arrested in April 2009 and charged with grand theft of over \$400, occurring from November 15, 2003 to March 12, 2009. (§ 487, subd. (a).) Although she was originally charged with two other offenses, those charges were dismissed before trial. The amended information was filed May 10, 2010 and included allegations that the stolen items were valued at more than \$65,000 and/or \$200,000. (§ 12022.6, subds. (a)(1), (a)(2).)

C. Trial, Instructions and Verdict

The investigation continued, and on July 1, 2009, the investigators went back to carry out a second search warrant for Kelly's home and shed, finding over 2,133 toys (about 6,000 items total). Inside a bedroom closet that had previously been searched, they found apparently newly obtained toys and clothes, as well as packages of diapers. When they searched the shed, they found hundreds more toys, and about 200 "My Stuff Bags," containing items such as toiletries, toys, books, and water bottles, and worth over \$75 each.

When the items found in the storage unit (1,948 toys), the shed (2,133 toys), and the garage (7,500-8,000 items, toys and furnishings) were added up, about 12,000 items were seized, and most could be identified as coming from the donor agencies. A witness who worked for Wal-Mart estimated that the value of the items stored, as shown in inventory documents and photographs, was \$375,000.

The matter went to a month-long jury trial. Testimony was taken from Kelly's family members and from donor employees and representatives. Other witnesses, such as representatives of other foster care associations and investigators, testified about their dealings with Kelly. The manager of the storage facility testified that Kelly had rented her nearby storage unit January 21, 2009, which was after the time of the first visit from Campos and Young.

According to Soto's testimony, when her daughter was a baby in the early 2000's, Kelly gave Soto and other family members clothes, blankets and costumes to sell at the Spring Valley swap meet, and Soto gave the money she received to Kelly. A couple of years later, Soto started working for Kelly again, and she helped Kelly by selling blankets, clothes and shoes at yard sales, assisted by Jessica E. and the sister. Kelly went along one time. In October 2008, Soto went to Kelly's house to get toys for sale, and Kelly put prices on them, but Soto thought the prices were too high and did not take them.

Anastacia testified that she and other family members sold toys, Halloween costumes, blankets, and clothing at swap meets. She said Kelly chose the toys to go into give-away bags for particular families, since Kelly thought certain people deserved a

better selection. Anastacia described how Soto was given toys to sell, and how Kelly also asked Anastacia in 2007 and 2008 about selling toys, but Anastacia did not do so.

Kelly's foster child, Cynthia O., described one day that she spent packing up toys from an upstairs room, bagging them and loading them into Philip's truck for transport to the storage unit. According to Osuma, Kelly picked out certain items for friends and for her children. Osuma testified Kelly gave Halloween costumes to Soto to sell. Jessica, her sister, testified similarly, and told about going to Wal-Mart with Kelly to find out prices to put on toys that were going to Soto.

Representatives from each of the three donor agencies testified about their dealings with Kelly and the general philosophy and purposes of their organizations, which were to help dependent or abused children. The representative from PCC stated that although donations were not solicited, many were received in varying conditions of usefulness, and the organization passed them on to others, for their benefit and also to free up storage space. The PCC did not use a contract but its policy was to donate items to be distributed to children in foster care, free of charge. It received donated "My Stuff" bags, containing various items for foster children or children in crisis, and it understood such children had an immediate need for such items, so that storing them was counter-indicated. In general, the PCC did not intend that the items they gave to other organizations could be sold or stored away. When PCC staff members called Kelly, she never turned down any items or said that she had an excessive supply.

In 2008 and other years, Kelly signed a TFT "Agreement to Participate," which stated that toys would be accepted and distributed for free. TFT staff witnesses explained

that they understood the toys they handed out to agencies in November should be distributed by December, and leftovers could be or should be returned to TFT. Kelly never told TFT she had leftover toys.

In 2007 and 2008, Kelly obtained many hundreds of toys, costumes, and some gift cards from various CAPF drives, for Halloween, "Stuff the Bus," and Christmas. Kelly never let staff members know that she already had toys stored at her house and garage, or that she did not need any more.

According to a representative from the San Diego Foster Parent's Association, Kelly picked up toys and distributed them at monthly foster services meetings or support groups, and she never told anyone she had any extras to share. A representative from another kinship foster assistance agency, the Family Rose House, testified that Kelly requested and obtained TFT toys from it in 2008.

The jury watched a video recording of the July 1, 2009 search conducted of the home. In connection with a motion for acquittal (denied), counsel and the trial court discussed the prosecutor's evolving theory of theft, which originally had been theft by larceny (taking property without the owner's consent). A proposed instruction on that theory, CALCRIM 1800, was withdrawn, because the prosecutor now took the position the donations had been given to the Association and Kelly, arguably transferring possession and/or title to her. After discussion, other instructions were proposed on theft by false pretense, theft by trick and embezzlement.

In the defense case, Kelly's daughter Theresa described how she bought the house on Church Street in 2003 to assist the Association in having a place to meet and to do its

business. Beginning in 2006, Kelly started to use the newly vacated garage for storage. Theresa said she never saw Kelly sell any donated items, and that Kelly worked hard to help others. Other acquaintances in the foster care community also believed that Kelly was honest and worked hard to help others.

Kelly's housekeeper in 2001, Miroslava Jaimes, noticed at that time that Anastacia had twice brought black bags of clothing and toys downstairs to sell at a swap meet, and Anastacia told her she should not say anything about it to Kelly.

A defense CPA who reviewed Kelly's 2007-2009 bank accounts did not find any cash deposits to the account, and he could account for all other deposits, from social security, foster care and work compensation, and a pension.

On her own behalf, Kelly testified she always intended to distribute the toys she had in storage, "later on," and she saved toys to have them available to take to support groups year-round. When Kelly obtained items from the donor agencies, she said she was not told what to do with the items, nor did the agencies require her to return any excess items. Some of the PCC items were not suitable for children, and she would give those away to other charitable institutions. She said she never asked either Soto or Anastacia to sell toys or Halloween costumes for her, and she does not have any financial need to do so.

At the close of the case, the prosecution argued that based on the evidence presented, the jury could convict Kelly on any of three theories of theft, false pretense, theft by trick, and/or theft by embezzlement. The jurors received instructions about the elements of those theft offenses, and were told they did not need to agree on the form of

theft: "You may not find the defendant guilty of theft unless all of you agree that the People have proved that the defendant committed theft under at least one theory. But all of you do not have to agree on the same theory." (CALCRIM No. 1861, adapted.)

After sending out a request for extra copies of the instructions about the elements of the theft offenses, the jury reached a guilty verdict on grand theft, as well as true findings on both allegations about the amounts taken, \$65,000 and \$200,000. At sentencing, Kelly received three years of formal probation, with limited custody and electronic surveillance, and fines were imposed. She appeals.

DISCUSSION

I

SUFFICIENCY OF EVIDENCE: INSTRUCTIONS GIVEN

To assess Kelly's contentions that the record does not disclose sufficient evidence of grand theft under any of the theories argued to the jury, we apply well established rules. The appellate court reviews the entire record in the light most favorable to the judgment "to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*); *People v. Fenderson* (2010) 188 Cal.App.4th 625, 634 (*Fenderson*).)

As a reviewing court, we do not reweigh the facts in evaluating the defendant-appellant's arguments. (*Bolin, supra*, 18 Cal.4th 297, 332-333.) The credibility of witnesses and the weight to be accorded to the evidence are matters to be determined by the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; Evid. Code, § 312.)

The courts do not "look to legal theories not before the jury in seeking to reconcile a jury verdict with the substantial evidence rule." (*People v. Kunkin* (1973) 9 Cal.3d 245, 251 (*Kunkin*.) The different theories of theft are "aimed at different criminal acquisitive techniques . . . [but,] with other larcenous crimes, have been consolidated into the single crime of theft (. . . § 484)" (*Ashley, supra*, 42 Cal.2d 246, 258; *Fenderson, supra*, 188 Cal.App.4th 625, 641.)

People v. Curtin (1994) 22 Cal.App.4th 528, 531, stands for the rule that "[w]hile a general verdict of guilt may be sustained on evidence establishing any one of the consolidated theft offenses [citations], the offense shown by the evidence must be one on which the jury was instructed and thus could have reached its verdict." (*Ibid.*) However, where an alternative theory of theft has additional required substantive elements, and where the jury was not given instructions about the additional elements, the court will reverse a judgment of conviction of theft on a general verdict. (*People v. Beaver* (2010) 186 Cal.App.4th 107, 123.) The reason is that the jury must have been given an opportunity to determine whether the additional elements were proved beyond a reasonable doubt. (*Id.* at pp. 124-125.)

In *People v. Nazary* (2010) 191 Cal.App.4th 727, 741, this court explained that the "combination of 'several common law crimes under the statutory umbrella of "theft" did not eliminate the need to prove the elements of the particular type of theft alleged. [Citations.]' [Citation.] 'Although the offense of theft has been substituted for the offenses of larceny, embezzlement and obtaining money or property by false pretenses, no elements of the former crimes have been changed. The elements of the former

offenses of embezzlement and larceny and the distinction between them' continue to exist. [Citations.]" (*Ibid.*) However, " '[j]uries need no longer be concerned with the technical differences between the several types of theft, and can return a general verdict of guilty if they find that an "unlawful taking" has been proved.' " (*Fenderson, supra*, 188 Cal.App.4th 625, 638, citing *Ashley, supra*, 42 Cal.2d 246, 258.)

On the consolidated charge of theft, the prosecutor pursued all three theories, arguing to the jury the evidence at trial showed Kelly "stole [toys] from Toys for Tots, stole from the Child Abuse Prevention Foundation, [stole items] from Polinsky either by trick, by false pretense, by embezzlement, any way that you want to get there, but stolen." Pattern instructions were given on theft by false pretense (CALCRIM No. 1804) and theft by trick (CALCRIM No. 1805). The court also gave a special instruction on embezzlement.

Contrary to Kelly's argument, this complete set of instructions placed every element of each theory before the jury, allowing this court now to consider whether sufficient evidence in the record demonstrates that there was an "unlawful taking" under one or more of the theories, substantially supporting the verdict and judgment. (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1846 (*Wooten*); *People v. Hernandez* (1988) 47 Cal.3d 315, 345-346; cf. *Kunkin, supra*, 9 Cal.3d 245, 251.)

II

SUFFICIENCY OF EVIDENCE ON GRAND THEFT: CONTENTIONS & ANALYSIS

Much of Kelly's argument on appeal hinges upon the undisputed fact that she, as the president of the Association, had a legitimate basis to come into possession of

donations from the three donor agencies and other donors. She testified she did not know how to say no to the donor agencies, and claims all the items were legally obtained, even if she became overwhelmed and unable to distribute all of them. She therefore argues that no proof of any trespassory taking could be or was produced, since the donor agencies did not clearly or expressly require prompt distribution, nor returns of any unused toys. She also questions whether the prosecutor intended to prove she embezzled property from the three donor agencies, or instead from her own agency, the Association. She concludes the jury did not have sufficient evidence to return any verdict of grand theft.

For an overview of these legal issues, we turn to *People v. Traster* (2003) 111 Cal.App.4th 1377, 1387 (*Traster*) in which the court outlined the distinctions among two of these different offenses, concerning title and/or possession. If theft by false pretenses is charged, the prosecution must prove that both title and possession were " 'absolutely parted with' " by the victim. (*Ibid.*) This is to be distinguished from larceny by trick, in which "the defendant obtains possession of property for a specific or special purpose, [and] the owner does not relinquish title." (*Ibid.*) However, the crime remains theft by false pretenses "if the owner of the property gives the property to the defendant or another he controls intending the defendant or this other entity to become the unconditional and unrestricted owner," in reliance on false representations by the defendant. (*Ibid.*; fn. omitted.)

Next, embezzlement requires "the existence of a 'relation of trust and confidence,' similar to a fiduciary relationship, between the victim and the perpetrator." (*Wooten*,

supra, 44 Cal.App.4th 1834, 1845.) Embezzlement does not require proof of any trespassory taking, and is one variety of the different criminal acquisitive techniques that fall under the single crime of theft defined in section 484. (*Fenderson, supra*, 188 Cal.App.4th at p. 641; *Ashley, supra*, 42 Cal.2d 246, 258.) Utilizing the principles set forth above, we address Kelly's specific challenges to the sufficiency of the evidence in support of this conviction.

A. False Pretenses

"A theft conviction on the theory of false pretenses requires proof that (1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation. [Citations.] In this context, reliance means that the false representation 'materially influenced' the owner's decision to part with his property; it need not be the sole factor motivating the transfer. [Citation.] A victim does not rely on a false representation if 'there is no causal connection shown between the [representations] alleged to be false' and the transfer of property. [Citations.] Thus, if the defendant makes both true and false statements to the owner, but the false statements are irrelevant to the owner's decision to transfer the property, theft on the theory of false pretense has not been committed. [Citation.] Reliance may be inferred from all the circumstances." (*Wooten, supra*, 44 Cal.App.4th 1834, 1842-1843.)

The evidence showed that Kelly had been prominent in the foster care community for decades, and the donor agencies regularly relied on her role with the Association to assist them in distributing donations. The jury had to decide whether the donor agencies

provided goods to Kelly, on behalf of her Association, including a full transfer of title as well as possession, for the stated, express purpose of enabling further donations to others, and in a manner acceptable to the relevant community, in reliance on representations she made about her activities and the Association.

We reject Kelly's contention that the bulk of the evidence failed to focus appropriately upon her own conduct and her misleading representations (whether express or implied), but instead addressed only the "wishes of the donating agencies." Rather, testimony from representatives of the donor agencies presented to the jury their policies and procedures about the manner or the timeliness of the expected delivery of their donated goods, based upon their understanding of the role of recipients and distributors, such as Kelly and her Association, in the relevant community. It is not a valid defense for Kelly to argue she did nothing wrong, merely because some of the donor agencies had more toys than they could distribute, particularly after each Christmas season (e.g., TFT had 22,000 left over one year). It is not an element of any of the theories of theft presented to the jury that the donor agencies had to have a written policy or had to make express communications about the time frame in which they expected distribution should occur, or alternatively, had to tell distributors such as the Association or Kelly that any leftover donated materials must be returned to the donor.

Instead, the representatives of the donors explained they routinely used qualified community members and associations to distribute donated items to foster children and families, including the San Diego Foster Parent's Association and Kelly's Association. These circumstances gave rise to Kelly's express and implied representations to the three

donor agencies that she would take the donations in the spirit in which they were given, based on the functions of such recipient agencies, and she would redistribute them appropriately on behalf of her Association. Throughout the year, household goods and clothing and "My Stuff" bags were given out by PCC and CFTA, and particularly during the Christmas seasons, all the donors promoted toy drives. The jury could make reasonable inferences that donations made at the time of the Christmas season were particularly time sensitive in nature, with respect to distribution. In 2007-2008, CFTA gave Kelly many Halloween costumes, which are also time sensitive donations, based on the occurrence of that once a year holiday.

From this type of evidence, the jury could reasonably have found that the three donor agencies, as the recipients of donations who now qualified as owners of the goods, parted with both title and possession of the property in favor of Kelly's Association, only because she impliedly and convincingly, but falsely, represented to them that her Association would serve as a temporary way station, enabling the donated goods to be distributed to the intended beneficiaries, and in a timely manner. Kelly did not run a large operation, but worked out of her home, rented storage, and the garage supplied by her daughter, and those circumstances about her Association gave rise to her implied representations that the goods she received on its behalf would not be warehoused, but instead would be distributed to children as reasonably possible.

The relevant circumstances also included Kelly's behavior upon receiving donated goods over a period of more than five years, during which she placed certain conditions on the receipt of the goods that were not shown to be anticipated by the donors as part of

the charitable endeavor. From this behavior, the jury could reasonably have inferred that she acted with an intent to defraud the original owners of that property into parting with it, title and all. Specifically, there was evidence that she and Soto priced goods and sold them at yard sales and elsewhere, and Kelly herself required payment from at least one foster parent (Chavez), along with inventing a requirement of training hours, in order to distribute the donated goods. Kelly consistently set aside the nicer toys for family and friends, chose certain foster families to get certain toys, and kept many others.

Because Kelly held herself out to be acting on behalf of her Association when receiving the donations, the evidence supports findings that she made false representations about how and when she would dispose of the goods, and that the three donor agencies reasonably relied on her status in the foster parent community in making their decision to utilize her as a conduit for the donations. The evidence thereby showed that they were "materially influenced" by her representations to choose her to receive their items, believing that she would ensure they would go to the ultimate beneficiaries, foster children, and not be stored. (*Ashley, supra*, 42 Cal.2d 246, 258-259.)

Based on the sum total of the evidence, the jury was justified in reaching a verdict by concluding that Kelly used the criminal acquisitive technique of obtaining both title and possession to donated goods, through theft by false pretenses.

B. Theft by Trick

"Larceny by trick and device is the appropriation of property, the possession of which was fraudulently acquired" (*Ashley, supra*, 42 Cal.2d at p. 258; *Traster, supra*, 111 Cal.App.4th 1377, 1387.) If the jury concluded that the three donor agencies

merely passed to Kelly possession of, not title to, the donated goods, the jury had ample evidence to make a finding that Kelly acquired such possession on a fraudulent basis. Soto lived with Kelly and worked for her between 1999 and 2005, when she had access to the toys and Halloween costumes. Soto testified that she sold such clothing, costumes and blankets at swap meets, from Kelly's house and with Kelly's family members, from at least 2000 to 2005, when she remarried. During the time frame that Soto continued to associate with Kelly, Chavez purchased toys and costumes from Soto at her apartment, that Soto evidently could not otherwise afford.

Soto testified that in October 2008, she went to visit Kelly to obtain toys for sale, but the deal fell through because Kelly priced them too high for Soto's customers, and Soto reported this to Chavez, who said she was going to report Kelly. According to the testimony from Chavez, as early as 2003, she was buying toys from Soto around Christmas time, and she spent approximately \$50 each time. In 2007 and 2008, Chavez saw Kelly dropping off several big black garbage bags filled with something at Soto's apartment.

From the bulk of evidence about how some portion of the donated goods was treated after possession was received, e.g., being sold and given out preferentially, the jury could reasonably have believed that even if Kelly never acquired title to the goods, or if the Association did not, she nevertheless took possession of them with an intent to accomplish some purposes of her own, that were different from the charitable purposes which the three donor agencies embodied. Such an offense would be "more

appropriately characterized as larceny by trick than as theft by false pretenses." (*Traster, supra*, 111 Cal.App.4th 1377, 1389.)

Specifically, the evidence established that the donor agencies intended to provide the donated goods to foster children, by utilizing distributors such as Kelly who actually worked in the field, and the donors provided her Association with donated items to carry out that express purpose, and for no other. (*Traster, supra*, 111 Cal.App.4th 1377, 1388.) It makes no difference that she successfully distributed many items, because she took many more than she knew she could reasonably handle and then stored many thousands over the years, while still obtaining more. It can reasonably be inferred from all the evidence that Kelly knew the intended purpose of the donations, but acquired possession of them through trick or device, constituting this form of a criminal acquisitive technique.

C. Embezzlement

Kelly next contends there was no sufficient proof of embezzlement here, because the prosecution failed to prove that her own agency, the Association, with whom she had a fiduciary relationship as president, was the actual victim of embezzlement. Kelly argues the evidence did not support any prosecution theory that she took the donated goods from the outside donor agencies, which she did not represent on a fiduciary basis, but then improperly held or stored goods without distributing them. Kelly claims she lawfully acquired possession of the donated goods, and no criminal intent to withhold them from her Association or others was proven.

The prosecution presented testimony from other founding members of the Association, Hilda Fernandez and Socorro Diaz, about the purposes of the Association,

which are to provide Spanish-speaking foster parents with information about services available to help them. The organization had over 300 members, and Fernandez and Diaz had each been officers of it at various times since it was founded in 1995. Fernandez and Diaz agreed that Kelly did most or all of the work of the Association, including the distribution of toys.

In the special jury instruction on embezzlement, the court defined that theory as theft by fraudulent appropriation of property by a person to whom it was entrusted, as an officer of an association, including her own Association. The court explained that the People had to prove her official status, and that by virtue of her position, she was entrusted with property belonging to someone else, but she "fraudulently appropriated that property for any use or purpose not in the lawful execution of the trust, or the defendant secreted the property with a fraudulent intent to appropriate it to that use or purpose." The court defined acting "fraudulently" as taking undue advantage of another person or causing a loss to that person by breaching a duty, trust or confidence. An available defense was a good faith belief in acting with authorization to use the property. The instruction continued, telling the jury it could conclude the defendant's belief she had a right to the property was not in good faith, if the defendant was aware of facts that made that belief completely unreasonable. Even a temporary deprivation of property rights was enough.

It makes no difference that this instruction broadly defined the element of entrustment of property, as possibly coming from more than one Association or donor agency, because the evidence fully supported that instruction and it was not erroneous as

a matter of law. Here, as in *Fenderson*, even if we assume that Kelly lawfully acquired possession of the donated goods, there is still substantial evidence to establish that Kelly knowingly diverted a significant proportion of the donated goods, for personal purposes "not permitted or contemplated by" either by the three donor agencies, or by her own Association. (*Fenderson, supra*, 188 Cal.App.4th 625, 641.)

As the trial court commented at sentencing, the monetary benefit that Kelly received (money in her pocket) was not the dispositive factor. Kelly's activities adversely affected each of the organizations or agencies involved, and demonstrated she had purposes of personal gain or advantage, that were different from the purposes of the donor agencies or her own Association. These activities included preferentially giving items to her own family and friends, over other Association members who would equally be entitled to receive such donations, and withholding the stored items so she could control them. The jury had a sufficient basis to conclude that she was or must have been aware of such facts that made any belief unreasonable on her part, that the items she controlled were no longer subject to competing claims of ownership, such as her Association or the original donor agencies.

Because Kelly's course of conduct amounted to unlawful taking and diversion of donations for purposes "not permitted or contemplated by" any of the agencies involved, (*Fenderson, supra*, 188 Cal.App.4th 625, 641), there is substantial evidence in the record to support this theory of theft by embezzlement. The jury was made aware of the relationship among the various associations and donor entities, and the manner in which Kelly treated the donated materials was inconsistent with the evidence about the purposes

of the donor entities, as well as Kelly's own Association. Further, the record as a whole supports the view that an unlawful taking of a substantial proportion of the donated goods was accomplished, under any or all of the theories presented, by the manner in which Kelly conducted the business of the Association, as well as her own personal business.

III

JURY UNANIMITY PRINCIPLES

A. Applicable Standards

Despite our conclusions above that substantial evidence supports the conviction of grand theft on any or all of the three theories argued to the jury, a different issue is presented on appeal about whether these trial proceedings were in compliance with the rules regarding jury unanimity. The jury unanimity requirement ensures that for a conviction to be valid, the defendant is found guilty of the specific crime of which adequate notice has been given in the charges and trial proceedings. (*Russo, supra*, 25 Cal.4th 1124, 1132; see *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234, 1237-1238.) "Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*Russo, supra*, at p. 1132.) "On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (*Ibid.*)

"This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*Russo, supra*, 25 Cal.4th 1124, 1132.) These guidelines apply:

"[U]nanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Id.* at p. 1135.)

Where the prosecution theory and proof are that multiple takings were motivated by a single plan, a unanimity instruction is not required. (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.) Where "the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct," and the same basic defense is offered, the jury would not have any reasonable basis for distinguishing between them, and are not required to hear the unanimity instruction. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 275; quoting *People v. Stankewitz* (1990) 51 Cal.3d 72, 100; *Crandell, supra*, 46 Cal.3d 833, 875.)

B. Record; Analysis

During closing argument, the prosecutor argued all three theft theories to the jury, and said that the evidence at trial showed Kelly stole toys and other items from the three

named donor organizations, and the jury could reach a verdict of guilty, "any way that you want to get there, but stolen."

During instructions, the jurors were told they did not need to agree on the form of theft: "You may not find the defendant guilty of theft unless all of you agree that the People have proved that the defendant committed theft under at least one theory. But all of you do not have to agree on the same theory." (CALCRIM No. 1861, adapted.) They also received predeliberation instructions, including a requirement that the verdict on each count and any special findings must be unanimous. (CALCRIM No. 3550, adapted.)

Kelly contends the trial court erred in failing to give, sua sponte, a unanimity instruction, because under the evidence presented, the jury could have disagreed as to which of several acts or different factual options could have supported a guilty verdict on theft. (*People v. Davis* (2005) 36 Cal.4th 510, 561.) CALCRIM No. 3500, the standard unanimity instruction, states in relevant part that the jurors must all agree that the People proved that the defendant committed at least one of the acts for which evidence was presented, and they must all agree on which act was committed. Kelly argues that the donor agencies should not be treated alike, claiming that PCC was distributing donations mainly for its own convenience, to free up storage space; however, that is not an accurate characterization of the record, since PCC's other purpose in donating was to benefit foster children for free, and it normally receives more items to pass on during the holiday season, including toys (similar to the other donor agencies).

To apply the required analysis, we look to the record for any indication of significant risk the jury might have divided, or been uncertain, "as to the exact way the defendant is guilty of a single discrete crime." (*Russo, supra*, 25 Cal.4th at p. 1135.) If the evidence merely presents a possibility the jury might be confused about the exact way the defendant committed theft, the unanimity instruction is not warranted. (*Ibid.*)

We disagree with Kelly that the court's instructions failed to provide the jury with adequate guidance for evaluating the evidence about her activities in soliciting and accepting donations for her Association, while failing to distribute many of them to appropriate recipients and in an appropriate manner. The evidence showed that she carried out a continuous course of conduct over a five-year period that was consistent as to the different donor organizations with whom she dealt at any given time, and this conduct allowed her to gain personal benefit for herself and her family. The manner in which she obtained and stored the items did not distinguish between different donors, regarding the type of donation, the time of receipt, or her placement and disposition of the items. She offered the same defense to each theft theory, and the jury would not have had any reasonable basis for distinguishing among particular incidents taking place within this continuous course of conduct. (*People v. Davis, supra*, 36 Cal.4th 510, 561.)

Accordingly, there was no instructional error, harmful or otherwise. Substantial evidence supports the verdict and true findings, and we affirm.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.